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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. LANITA MICHELLE CHAVERS, Defendant and Appellant.	G040378 (Super. Ct. No. 06WF3260) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, John Conley, Judge. Affirmed.

Richard Glen Boire, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Gary W. Schons, Assistant Attorney General, Rhonda Cartwright-Ladendorf and Kristen Kinnaird Chenelia, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

In 2006, defendant Lanita Michelle Chavers drove a getaway car for Maxcuim Herring while he robbed several fast food restaurants. A jury convicted defendant of five counts of second degree robbery. (Pen. Code, §§ 211, 212.5, subd. (c).)[1] The jury also found true gang enhancement allegations pursuant to section 186.22, subdivision (b)(1) (§ 186.22(b)(1)), and gun enhancement allegations pursuant to section 12022, subdivision (a)(1). After striking the enhancements for all but the second count of robbery, the court sentenced defendant to an aggregate term of 13 years in prison. Each of the two year sentences for robbery ran concurrently, but the 10 year enhancement under section 186.22(b)(1), and the one-year enhancement pursuant to section 12022, subdivision (a)(1), ran consecutive to the term imposed on count two.

Defendant asserts she should not have received an enhancement pursuant to section 186.22(b)(1), which mandates an additional consecutive sentence for "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." Defendant's primary argument is the People were collaterally estopped from charging her with this enhancement because Herring, in an earlier trial, was acquitted of the section 186.22(b)(1) gang enhancement allegations against him.[2] Defendant also claims there is insufficient evidence in the record to sustain the jury's section 186.22(b)(1) findings and she was prejudiced by the prosecutor's alleged misstatement of the law in her closing argument. We affirm.

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[1] All statutory references are to the Penal Code.

[2] As requested by defendant, we take judicial notice of the proceedings in *People v. Herring* (Super. Ct. Orange County, 2006, No. 06WF3260).

FACTS

In July 2006, Herring accosted an assistant manager of a Jack in the box restaurant who was on his way to deposit a bag of cash at the bank on behalf of the restaurant. Herring, using his hand to simulate a gun under his clothes, demanded the money; the assistant manager complied. Herring ran across the street. He eventually entered the rear, driver's side door of a minivan, which sped away.

In August 2006, Herring approached a Wendy's restaurant employee who was taking out the trash. Herring pointed a gun at the employee, grabbed the employee's arm, and directed the employee into the restaurant. Herring ordered all four employees inside the restaurant to lie on the ground; after they complied, Herring tied the hands of three employees with "zip" ties. Herring then instructed the manager to give him all the money at the restaurant. The manager complied. Herring tied up the manager, then fled the restaurant.

A felony complaint (in October 2006) and information (in January 2007) were filed against Herring and defendant based on the crimes described above, as well as other robberies for which only Herring was charged. In September 2007, the court granted the People's motion to sever the cases of Herring and defendant; neither defendant objected to this motion. By consolidated and amended information, defendant was charged with five counts of second degree robbery — one count for the Jack in the box robbery and four counts (one for each employee) for the Wendy's robbery. The information alleged defendant "committed the above offense[s] for the benefit of, at the direction of, and in association with 52ND STREET HOOVER CRIPS, a criminal street gang, with the specific intent to promote, further, and assist in criminal conduct by members of that gang."[3]

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[3] The 52nd Street Hoover Crips are also referred to in the record as the "Five Deuce Hoover Gangster Crips" and the "Five Deuce." These references are all to the

Herring's trial proceeded first. As noted above, Herring was charged with numerous crimes for which defendant was not charged. He was convicted of the Wendy's robberies, but was never tried for the Jack in the box robbery. The jury found not true the gang enhancement allegations. The court sentenced Herring to more than 30 years in prison.

In a pretrial hearing in defendant's case, the court asked counsel whether collateral estoppel applied with regard to "the People going forward with a gang allegation on Miss Chavers when all the gang charges and gang allegations were found not true as to the robber? I think there isn't, but I wanted you to both focus on that . . . The general rule seems to be that an acquittal or a finding of a lesser degree on one defendant doesn't stop the People from going forward on another. The only exception is . . . where it's vicarious liability. Which I don't think it is here. But I wanted you both to focus on that." This issue was not raised again until sentencing, at which point defense counsel indicated he agreed "with the People's position" that it was permissible to charge defendant with a 186.22(b)(1) enhancement even though Herring was acquitted of the charges.

The evidence presented against defendant at trial was derived from several sources. Eyewitnesses, primarily the victims of the robberies, testified to Herring's conduct in committing the robberies as set forth above. Moreover, the parties stipulated to Evidence Code section 1101, subdivision (b), evidence of another robbery for which Herring and defendant had been arrested: "On September 16th, 2006, defendant Lanita Chavers acted as the driver in a robbery of an individual named Salvador Vega. Mr. Vega was manager of a Pizza Hut restaurant in the city of Westminster. He was on his way to make a deposit at Bank of America at the time a deposit bag was taken from him by Mr. Maxcuim Herring. When the deposit bag was taken from Mr. Vega, Mr.

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same Los Angeles gang. We will follow the parties in referring to this gang as the "Hoover gang."

Herring ran from him and threatened him by displaying a firearm. Witnesses observed Mr. Herring throw a bag into a car as he ran from Mr. Vega. Defendant Chavers was contacted sitting in the driver's seat of that car. A bank deposit bag and a gun were found on the passenger floorboard of the car. The bag contained cash, Pizza Hut receipts, and the gun. Defendant later told . . . Police that she had driven Mr. Herring to that location."

Defendant supplied much of the evidence against herself in two interviews with police officers. Defendant admitted to driving Herring to the Jack in the box and Wendy's at issue, as well as other sites. She confirmed Herring possessed a handgun and black zip ties. Defendant admitted she received monetary payment for accompanying Herring to the sites of the robberies.

Defendant's statements during her interviews with police also provided evidence for the gang enhancement allegations against her. Defendant indicated she knew Herring for approximately four to five years. Defendant knew Herring's wife and had a social relationship with her. One detective asked, "He is not a Five Deuce, right? He is not rolling with the Five Deuce?" Defendant responded, "I know he hangs with them." Defendant was also asked about a robbery of a Boston Market restaurant, to which she replied that she had heard of it and that Herring "would run with another crew."

Lastly, a police officer, qualified as a gang expert with regard to certain south Los Angeles gangs (including the Hoover gang), testified for the prosecution. The gang expert explained gangs, including the Hoover gang, operate financially as a "hierarchy." For instance, some gang members will concentrate on drug distribution and sales, while others will form "robbery crews and they'll be better at going out and doing actual bank robberies, commercial robberies. That money then comes back in, they use that to still buy dope so they can sell more dope to buy more guns to further more robberies and split it up amongst the crew. Also, some of that money does come back to the hood and ends up going back to more of the senior gang members. [¶] They'll

actually have meetings, especially with the Five Deuce, they'll actually have meetings and identify people that aren't putting in work for the hood. . . . They discipline them and end up beating on them . . . if they don't think they are putting in work for the hood."

The gang expert further opined, based on conversations he has had with suspected gang members, that the Hoover gang commits "a lot of sophisticated robberies, they do a lot of bank robberies . . . . Commercial robberies. Take-over robberies outside of their area, because 77th division doesn't have a lot of wealth . . . as in big businesses . . . . So, they'll go outside the area to commit robberies." One basis for his opinion was information indicating that on multiple occasions in the summer of 2006 in Orange County, "a crew [of] Five Deuce Hoover Gangster Crips [committed] Rite-Aid[pharmacy] take-over robberies . . . . Sometimes they would use zip ties, sometimes they wouldn't. But it was usually one or more gang members go in and they take over the location, they would rob them." The gang expert also testified that females are rarely full-fledged gang members, but the Hoover gang uses "females a lot of time to be their drivers in both shootings and for robberies. Because a female driving a car, if she is just with another male, [it is] just going to look like maybe they're a couple, or if they have individuals lay down in the back seat of the car, it's just going to be a female in the car." The gang expert provided several examples of recent Hoover gang robberies in which females were used as drivers.

The gang expert provided additional testimony pertaining to the specific issue of Herring's relationship to the Hoover gang. He testified that the term "hangs" with a gang means "association" with the gang; he also noted gang members will use the term "hangs with" to avoid either admitting or denying membership in a gang. He indicated he was familiar with Herring and heard his gang moniker was "Baby Devil" or "Baby Dev." Gang members with related gang monikers such as "Tiny Devil" (suggesting a relationship with Herring) were linked to the Rite-Aid robberies. Herring's cell phone records also linked him to the Hoover gang members connected to the Rite-

Aid robberies at the time of those robberies. The gang expert opined Herring "appeared to be part of a robbery crew that was doing Rite-Aids and also fast food robberies." The gang expert analyzed Herring's tattoos and opined the tattoos suggested Herring was a member of Hoover gang. Based on all the information available to the gang expert, he opined Herring was a member of the Hoover gang in the summer of 2006.

The prosecutor concluded by providing the gang expert with a "hypothetical" scenario — "assume that you have a female getaway driver of a series of robberies who tells the police that she committed the robberies with someone she knows to hang out with the Five Deuce Hoover Crips." After considering this scenario, the gang expert opined this scenario was "consistent with someone . . . associating with a gang member from Five Deuce Hoover Crips." The prosecutor then said, "Let's assume further for the purposes of this hypothetical that the female tells the police that she drove to various locations at the direction of the person she believes to hang out with Five Deuce Hoover Crips." "[I]s that consistent in your mind with someone who would be committing crimes at the direction of a member of the Five Deuce Hoover Crips?" The gang expert agreed this conclusion was consistent with the scenario presented.

DISCUSSION

Collateral Estoppel

Defendant asserts Herring's acquittal of the gang enhancement charges logically compels her acquittal of the same enhancement charges.[4] After all, Herring was the principal actor in the robberies and the accused gang member. Conversely, defendant aided and abetted the robberies by driving a car, and nothing in the evidence suggests she

[4] Defendant frames her argument as one for ineffective assistance of counsel, as her trial counsel did not move for dismissal of the section 186.22(b)(1) allegations based on the result in Herring's trial.

is a member of a criminal street gang. Because Herring's jury rejected the accusation that the robberies committed by Herring met the elements of section 186.22(b)(1), defendant reasons the doctrine of collateral estoppel compels this court to reverse the true finding on the gang enhancement allegations.

"Collateral estoppel has been held to bar relitigation of an issue decided at a previous trial if (1) the issue necessarily decided at the previous trial is identical to the one which is sought to be relitigated; if (2) the previous trial resulted in a final judgment on the merits; and if (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the prior trial." (*People v. Taylor* (1974) 12 Cal.3d 686, 691 (*Taylor*) [disapproved on a different issue in *People v. Palmer* (2001) 24 Cal.4th 856, 867 (*Palmer*)].) Criminal defendants, however, generally cannot rely on the previous acquittal of a codefendant in a separate trial to collaterally estop the government from charging them with a crime for which a guilty verdict would be logically inconsistent with the co-defendant's acquittal. (*Standefer v. United States* (1980) 447 U.S. 10, 22-26; *Palmer*, *supra*, 24 Cal.4th at pp. 866-867.)

In *Standefer*, the Supreme Court rejected the application of collateral estoppel to bar a defendant's conviction for aiding and abetting a crime for which the principal had been acquitted. (*Standefer*, *supra*, 447 U.S. at pp. 11-14, 26.) In contrast with civil cases, the *Standefer* court explained, the prosecuting authority in criminal cases "is often without the kind of 'full and fair opportunity to litigate' that is a prerequisite of estoppel." (*Id*. at p. 22.) "Several aspects of our criminal law make this so: the prosecution's discovery rights in criminal cases are limited . . . ; it is prohibited from being granted a directed verdict or from obtaining a judgment notwithstanding the verdict . . . ; it cannot secure a new trial on the ground that an acquittal was plainly contrary to the weight of the evidence . . . ; and it cannot secure appellate review where a defendant has been acquitted. (*Ibid*.) Whereas a criminal defendant can obtain relief from a guilty verdict "induced by passion or prejudice," the government possesses no

remedy for acts of jury nullification. (*Id*. at p. 23.) Finally, the public and the government have a strong interest in enforcement of the criminal law, even if a prior jury came to a conclusion that could lead to inconsistent verdicts. (*Id*. at pp. 24-25.)

Since the *Standefer* decision, California courts have approved of its reasoning and conclusions. (See, e.g., *People v. McCoy* (2001) 25 Cal.4th 1111, 1114 (*McCoy*) [aider and abettor can be held liable for greater offense than actual perpetrator]; *Palmer*, *supra*, 24 Cal.4th at p. 858, 862-866 [invalidating "rule of consistency" in conspiracy cases and affirming conviction of defendant for conspiracy despite previous acquittal of alleged coconspirator]; *People v. Wilkins* (1994) 26 Cal.App.4th 1089, 1090, 1093-1094 [aider and abettor may be convicted of murder even though alleged shooter is acquitted].)

In *Taylor*, *supra*, 12 Cal.3d at pages 689-690 and 697-698, a case which preceded *Standefer*, our Supreme Court applied collateral estoppel to preclude conviction of a getaway driver for first degree murder when one of his accomplices was acquitted of the murder of the other accomplice (who was actually shot and killed by the liquor store owners who were being robbed). The *Taylor* court expressly limited use of the doctrine to the particular circumstances presented: the defendant was outside the store in the getaway car when the shooting occurred, his guilt was predicated only on his potential "vicarious" liability for the criminal acts and mental state ("implied malice") of a previously acquitted confederate, and the evidence presented at both trials was nearly identical. (*Id*. at pp. 697-698.) Guilt was "vicarious" in *Taylor* because the issue for the jury to decide in that case was whether the liquor store robbers' actions were "sufficiently provocative to support a finding of implied malice[,]" which would satisfy both the robber's and the getaway driver's mental state requirement for a murder conviction. (*Taylor*, *supra*, 12 Cal.3d at p. 697.) Defendant relies on the holding in *Taylor*, claiming she too could only have been held liable vicariously for Herring's conduct.

The continuing vitality of *Taylor*, *supra*, 12 Cal.3d 686, is in question. Indeed, the California Supreme Court recently directed parties to a case for which a petition for review was granted to "brief and address: Is *People v. Taylor* (1974) 12 Cal.3d 686 [117 Cal. Rptr. 70, 527 P.2d 622], still good law, or should that decision be overruled or disapproved?" (*People v. Superior Court*, S164614, review granted Sept. 17, 2008 [2008 Cal. LEXIS 11286].)

But even assuming *Taylor* remains good law, the scenario presented in the instant case does not fit within the narrow rule announced in *Taylor*. Obviously, both cases involve the "discomforting" circumstance (*Standefer*, *supra*, 447 U.S. at p. 25) of a getaway driver, a classic aider and abettor, found guilty of a crime (or, in this case, a charged enhancement) despite the previous acquittal of an accomplice who more directly participated in the alleged crime (or enhancement) at issue. But in this case, defendant's liability under section 186.22(b)(1) cannot be accurately described as "vicarious" in the same way the term was used in *Taylor*. (Cf. *People v. Garcia* (2002) 28 Cal.4th 1166, 1173-1178 [sentencing enhancement for aider and abettor under § 12022.53, subd. (e)(1), is not dependent upon prior conviction of "shooter" who actually "personally discharged" firearm].)

"Aider and abettor liability is . . . vicarious only in the sense that the aider and abettor is liable for another's actions as well as that person's own actions. . . . But that person's *own* acts are also her acts for which she is also liable. Moreover, that person's mental state is her own; she is liable for her mens rea, not the other person's." (*McCoy*, *supra*, 25 Cal.4th at p. 1118.) Herring was convicted of the underlying robberies, and defendant makes no argument she was improperly convicted of any of the five charged counts of robbery. Defendant challenges her sentencing enhancement under section 186.22(b)(1), which requires the jury to find she committed the robberies: (1) "for the benefit of, at the direction of, or in association with any criminal street gang"; and (2) "with the specific intent to promote, further, or assist in any criminal conduct by

gang members." Defendant's liability for the sentencing enhancement is based in part on the jury's finding of her specific intent. Unlike *Taylor*, the jury here was not tasked with assigning an implied mens rea to defendant based on how provocative it deemed the acts of Herring. In light of its lonely and precarious existence in California jurisprudence, we decline to extend *Taylor*, *supra*, 12 Cal.3d 686, to the distinguishable factual scenario presented here.

Admittedly, the asymmetric result reached by defendant's jury is not "intellectually satisfying." (*Standefer, supra*, 447 U.S. at p. 25.) But we are not concerned the case before us will diminish "the integrity of the judicial system" (*Taylor, supra*, 12 Cal.3d at p. 695) through the "rendering of inconsistent verdicts" (*id.* at p. 696). For one, based on the large number of counts and enhancements alleged against Herring in his trial, it is possible the Herring jury came to a different result based on a desire to exercise leniency. Second, our review of the records in the two trials suggests different strategies and theories were pursued by the two different prosecutors with regard to the section 186.22(b)(1) allegations against defendant and Herring. Third, the court observed it "could have sentenced [defendant] much, much higher than it did." But in accordance with the People's request, the court struck most of defendant's enhancements, ran all of her robbery sentences concurrently, and sentenced her to 13 years in prison. The court, having tried both defendant and Herring, noted one reason for reducing defendant's sentence was to make certain defendant's sentence was significantly lower than Herring's, who received a sentence in excess of 30 years. Any dissatisfaction with the incongruity of the verdicts issuing from Herring's and defendant's crime spree is alleviated by the trial court's just sentencing decisions.

Substantial Evidence

Defendant next claims the record does not contain substantial evidence supporting either element of the gang enhancement. We must review the entire record in

the light most favorable to the judgment in determining whether it contains substantial evidence from which a rational trier of fact could have found defendant guilty beyond a reasonable doubt. (*People v. Villalobos* (2006) 145 Cal.App.4th 310, 321 (*Villalobos*).)

As to the first element, there is substantial evidence supporting the jury's finding the robberies were "committed for the benefit of, at the direction of, or in association with [a] criminal street gang." (§ 186.22(b)(1).) The jury could have concluded Herring was a gang member, and further concluded defendant was aware of that fact. Defendant admitted she drove with Herring to the robberies; the robberies were completed at the direction of and in association with Herring. The gang expert testified as to how crimes such as robberies benefit the Hoover gang and how gang members are expected to contribute to the gang by committing crimes and contributing money gained from such crimes. The expert also testified the Hoover gang had used female drivers as a means of avoiding detection during crimes and that similar robberies had occurred in the summer of 2006 involving individual gang members with ties to Herring. The jury was free to accept the expert testimony suggesting the robberies at issue were committed for the benefit of, at the direction of, or in association with the Hoover gang. (See *People v. Morales* (2003) 112 Cal.App.4th 1176, 1197-1198 (*Morales*).)

We also find substantial evidence supporting the jury's finding that defendant had the "specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22(b)(1).) Defendant claims this element requires the prosecution to prove she specifically intended to promote, further, or assist the Hoover gang by her actions. But this is not what the statute says; the statute requires assistance to "criminal conduct by gang members." (§ 186.22(b)(1).) "Commission of a crime in concert with known gang members is substantial evidence which supports the inference that the defendant acted with the specific intent to promote, further, or assist gang members in the commission of the crime." (*Villalobos*, *supra*, 145 Cal.App.4th at p. 322 [affirming conviction of girlfriend of gang member under section 186.22(b)(1)]; see also

Morales, *supra*, 112 Cal.App.4th at p. 1198 ["specific intent to *benefit* the gang is not required"].) Defendant admitted to a police officer she knew Herring "hung" with a criminal street gang. Defendant aided and abetted Herring by repeatedly driving Herring to Orange County to rob business establishments. It simply does not matter whether defendant was motivated by a specific intent to benefit a criminal street gang by her actions. There is substantial evidence supporting the finding she specifically intended to assist Herring, a man she knew to be a gang member, in committing robberies which, under the first element, were committed at the direction of, or in association with, the Hoover gang.

In her reply brief, defendant asks us to consider a recently published federal case. (*Briceno v. Scribner* (9th Cir. 2009) 555 F.3d 1069 (*Briceno*).) The *Briceno* court disapproved of *Morales*, *supra*, 112 Cal.App.4th 1176, because "merely being a gang member, or committing a crime in association with another gang member, is not enough to trigger the sentencing enhancements of § 186.22(b)." (*Briceno*, *supra*, 555 F.3d at pp. 1080-1081.) *Briceno* granted a petition for writ of habeas corpus because the only evidence supporting the finding of specific intent under section 186.22(b)(1) was the identification of the defendant armed robbers as gang members and gang expert testimony based on hypothetical questions using the facts of the case. (*Id*. at pp. 1078-1082.) *Briceno* asserted additional facts, such as the commission of the crime on gang "turf," the display of gang signs or use of a gang moniker during a crime, or other "circumstantial evidence of intent," are necessary to find a defendant had the specific intent required by section 186.22(b)(1). (*Id*. at p. 1081.)

We disagree with *Briceno*, which misconstrued *People v. Gardeley* (1996) 14 Cal.4th 605 in holding a defendant "must commit the crime with the specific intent to aid or abet the criminal conduct of the gang" to be liable for imposition of the gang enhancement. (*Briceno*, *supra*, 555 F.3d at p. 1080.) Instead, as explained by the dissenting opinion in *Briceno*, "*Gardeley* stands for the proposition that the statute 'does

not criminalize mere gang membership.' [Citation.] It does not support the contention that the majority purports to make — that the [California] Supreme Court would hold that the commission of a crime with another gang member is insufficient to establish specific intent to 'assist in any criminal conduct by gang members.'" (*Id.* at p. 1086 (conc. & dis. opn. of Wardlaw, J.).)

Alleged Misconduct in Closing Statement

Finally, defendant claims her trial counsel provided ineffective assistance by failing to object to certain statements made by the prosecutor in her closing statement: "It's [a] very, very simple analysis. [Defendant] is charged with committing this crime with a gang member or at his direction and helping him promote criminal conduct. It's as simple as that. She chose to commit crime. She may have chosen it because she wanted personal monetary gain. But she chose to enter into a partnership with a gang member. [¶] And that is the spirit of this allegation. You can choose to commit crimes all the time. But if you choose to commit a crime with someone you know is a gang member, you're looking at other potential charges." "No one is saying she committed this crime to help Five Deuce Hoover Crips. Nobody is saying that. No one is saying she cares about this organization and she is not charged with caring about them. I agree with counsel[,] I think his words were she doesn't give a crap about them. I agree. She cares about herself. But she chose to enter a partnership with a gang member." "She is not charged with helping the gang. She is not charged with doing gangy things. I think that was the word counsel used. No one is saying she walked into any of these places and displayed the Hoover gang sign. . . . This is a very simple analysis. She is charged with associating with and acting at the direction of a gang's representative, Mr. Herring."

The prosecutor's statements comport with the law as discussed above and as presented in the relevant jury instruction, CALCRIM No. 1401. We therefore find no

merit in defendant's assertion that her trial counsel should have objected to these statements.

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

SILLS, P. J.

RYLAARSDAM, J.